

N.D.A.G. Letter to Meier (May 6, 1986)

May 6, 1986

Honorable Ben Meier
Secretary of State
Department of State
State Capitol
Bismarck, ND 58505

Dear Mr. Meier:

Thank you for your letter of March 31, 1986, concerning amendments to articles of incorporation for farm corporations and business corporations which would allow them to convert operations from one form of business to another.

It is my opinion that a business corporation organized under N.D.C.C. Ch. 10-19.1 that converted to a farm corporation by adopting an amendment to its articles of incorporation, pursuant to N.D.C.C. § 10-06-01, may not reconvert to a business corporation by subsequent amendment to its articles of incorporation.

Generally, the right to act as a corporation is a special privilege conferred by the sovereign power. Until there is a grant of such right, whether by special charter or under general law, there can be no corporation. The commencement of a corporate existence depends on the terms of the statute under which the corporation is created. 18 Am.Jur.2d Corporations § 67 (1985).

The charter of a corporation is a contract between the state and the corporation and between the corporation and its members. 7A, Fletcher, Cyc. Corp., § 3657 (Perm. Ed. 1978). The state, in granting charters to corporations or in authorizing their creation under general laws, has the power expressly to reserve the right to alter, amend, or repeal such charters or general laws. Id. § 3668.

In the case of corporations formed under general laws, the statutes usually prescribe, or the articles of incorporation may prescribe, the manner in which the articles may be amended by the stockholders or members. The requirements of the statute should be complied with in making amendments, even though failure to do so does not always render the amendment invalid. To effect a fundamental amendment to a corporate charter under general laws, there must be substantial compliance with statutory requirements. 18 Am.Jur.2d Corporations § 95 (1985).

The extent of the power to amend thus conferred upon the corporation, its officers, or members, therefore, depends upon the terms of the statute and can only be exercised within the limitations and subject to the conditions imposed by the statute. Usually an amendment may be adopted if it contains provisions which might have been inserted in

the original charter at the time of making such amendments. Generally, the grant of the power to amend cannot be exercised to change the corporation in such a manner as to make an entirely different corporation, or change substantially the objects and purposes of the corporation. For example, a corporation organized for private business cannot by an ex parte amendment turn itself into a public service corporation. 7A, Fletcher, Cyc. Corp., § 3718 (Perm. Ed. 1978). (Indeed, if the law of the state so permits, stockholders may transform the corporation into one operated on a cooperative plan. Id., citing Equity Co-op. Packing Co. v. Hall, 173 N.W. 796 (N.D. 1919). N.D.C.C. § 10-15-44 still allows a corporation to convert itself into a cooperative by adopting an amendment to its articles by which it elects to become subject to N.D.C.C. Ch. 10-15.)

Fundamental changes in a charter, so as to force minority members to engage in a business entirely different from that into which they entered are generally not permitted. A material and fundamental change in the charter by an amendment to that charter is an unconstitutional violation of the contract rights of any shareholder who does not consent to such amendment. Id. § 3684.

At common law, fundamental amendments of the charter could not be made or accepted by a majority of the shareholders so as to bind the minority, and this included amendments changing the character or objects of the corporation so as to make it in effect a different corporation or so as to authorize it to engage in a different enterprise from that originally authorized. In modern corporation laws, however, more and more extensive power has been given to the majority or larger proportions of the shareholders to adopt even fundamental changes in the articles of incorporation against the dissent of the minority, but only where it is in furtherance of the original purposes of the corporation and does not fundamentally or radically change the character of the corporation or its objects. 12B, Fletcher, CYC. Corp., § 5776 (Perm. Ed. 1984).

N.D.C.C. § 10-06-01 states, in part, as follows:

A business corporation organized under chapter 10-19 may convert to a farm corporation by adopting an amendment to its articles of incorporation. (It should be noted that N.D.C.C. Ch. 10-19 referred to in this section has been repealed and replaced with N.D.C.C. Ch. 10-19.1.)

N.D.C.C. § 10-06-01 authorizes a business corporation to convert to a farm corporation by amendment to articles of incorporation. This is a fundamental change in the nature or character of the corporation, which would, in effect, create a new type of corporation. Without statutory authority, such a change would not be possible. However, we find no statutory authorization for a reconversion, by amendment to articles of incorporation, to a business corporation from a farm corporation that was previously a business corporation. Again, this would be a fundamental change affecting the nature and character of the corporation which would, in effect, create a new corporation. Without specific statutory authority, such a reconversion is not permitted.

North Dakota's corporation laws do provide specific instances when fundamental changes in a corporation can be made by amendment. Besides N.D.C.C. §§ 10-15-44 and 10-06-01, another example is found in N.D.C.C. § 10-19.1-127. This section allows a corporation whose period of duration has expired, but which had continued to do business despite expiration, to reinstate its articles and extend the period of corporate duration, including making the duration perpetual.

In light of sections which specifically authorize fundamental changes to the corporate charter, by amendment of the articles of incorporation, and in light of the common law which, generally, would forbid fundamental changes without specific authorization, it is not permitted for a converted farm corporation to reconvert to a business corporation. The only alternative for a converted farm corporation to resume operations as an ordinary business corporation would be to dissolve the farm corporation and to create a new business corporation.

Sincerely,

Nicholas J. Spaeth

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